United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1168

B

Pages 6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS,

Petitioner,

v.

Case No. 74-1168

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents,

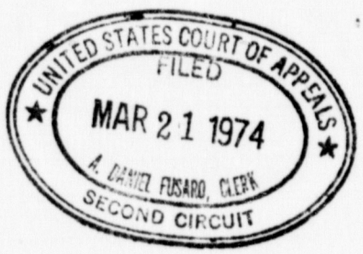
and

TIME-LIFE FILMS, INC., AMERICAN BROADCASTING COMPANIES, INC., COLUMBIA PICTURES INDUSTRIES, INC. and WARNER BROS. INC.,

Intervenors.

- -x

BRIEF OF INTERVENOR TIME-LIFE FILMS, INC. IN SUPPORT OF MODIFICATION OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION



Of Counsel:
Peter Bierstedt

HARDEE BAROVICK KONECKY & BRAUN
300 PARK AVENUE
NEW YORK, N. Y. 10022

PIERSON, BALL & DOWD
100 Ring Building
Washington, D.C. 20036

6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents,

and

TIME-LIFE FILMS, INC., AMERICAN BROADCASTING COMPANIES, INC., COLUMBIA PICTURES INDUSTRIES, INC., COLUMBIA BROADCASTING SYSTEM, INC. and WARNER BROS. INC.,

Intervenors.

Case No. 74-1168

- -x

BRIEF OF INTERVENOR TIME-LIFE FILMS, INC. IN SUPPORT OF MODIFICATION OF AN ORDER OF THE FEDERAL COMMUNICATION COMMISSION

Preliminary Statement

Time-Life Films, Inc. ("Time-Life"), the intervenor above-named, submits this brief in support of the instant Petition for Review of the January 23, 1974 order of the Federal Communications Commission ("FCC") initiated by petitioner National Association of Independent Television

Producers and Distributors ("NAITPD").

Time-Life supports the modifications of the subject order sought by NAITPD. Furthermore, Time-Life respectfully submits that, at the very least, the FCC order should be modified by postponing the effective date thereof for a single television season - until fall, 1975 - so as to give Time-Life and other independent producers and distributors sufficient time to adjust to the new rule.

Time-Life also supports the Petition for Review initiated by Westinghouse Broadcasting Company, Inc. in companion Case No. 74-1283 before this Court.

Motions by NAITPD, Westinghouse and Time-Life for a stay of the fall, 1974 effective date of the FCC order were denied by this Court on March 12, 1974 by granting movants an expedited appeal instead.

POINT ONE

NAITPD'S PETITION FOR REVIEW SHOULD BE GRANTED IN ALL RESPECTS

Time-Life supports the reasons presented by NAITPD in support of modification of the subject order, which reasons will not be repeated here so as not unduly to burden this Court.

The original prime-time access rule was designed to loosen the stranglehold of the television networks somewhat and to give practical effect to the public's right to television programs from non-network sources. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

Time-Life responded to the FCC's encouragement (after waiting more than two years for the access rule to take effect) by undertaking to distribute such quality series as Elizabeth R, Civilization, The Search for the Nile, The First Churchills, Great Zoos and Great Parks of the World, The Roads to Freedom (Jean Paul Sartre classics) and Life Around Us; one-hour personality specials on Indira Gandhi, Willy Brandt, Thomas Edison and others; one-hour specials on the environment such as The Noise Invasion; one-hour public affairs specials such as Ireland, The Making of a Republic, The Vatican and Beyond the Wall (East Germany); and a number of one-hour "Life Adventure Specials" such as The Photographers, Thirty Days to Survival and The Great American Balloon Adventure. A more complete list will be found as Exhibit C to Time-Life's Motion for Stay brought on by order to show cause in this proceeding.

Spurred by the success of these quality ventures and by the FCC's stated goal of reducing the network's

economic dominance and opening up a vital medium of communications to programs from diverse and even antagonistic sources, Time-Life committed substantial resources to produce and distribute additional quality programs for the 1974 television season, including another 26 half-hour episodes of its acclaimed Wild, Wild World of Animals, 12 additional one-hour episodes of its biographical series The Leaders, 29 half-hour episodes of a new and innovative variety show Music, Music, Music, 26 half-hour episodes of Time-Life's "Family Classics" series (Heidi, David Copperfield and Master of Ballantrae) and 19 one-hour episodes Tolstoy's War and Peace. These are discussed more fully in the affidavit of Wynn Nathan annexed to the order to show cause above-described and in Exhibits C through I annexed thereto.

But now, without warning, after the FCC announced that it was evaluating the access rule's practical performance in achieving its originally stated objectives, the FCC suddenly pulled the rug out from under the independent syndicators and from the viewing public by issuing the subject order, which order simultaneously announced that "we do not believe that [original access] rule has had a sufficient test to demonstrate what its future performance will

be" (par. 91) and that the access period was being reduced by more than half.

This terrible blow to non-network controlled programming necessitates relief by this Court. The scope of review of the FCC order by this Court developed at common law and was ultimately codified in 5 U.S.C. §706 (80 Stat. 393), providing that this Court "shall" (emphasis added)

> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity:
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

It is respectfully submitted that the record shows that each of the independently sufficient criteria (A), (B), (E) and (F) are present herein and that the subject order should be modified in accordance with the position expressed by NAITPD, Westinghouse and Time-Life.

POINT TWO

AT THE VERY LEAST, JUSTICE AND BASIC FAIRNESS REQUIRE THAT THE EFFECTIVE DATE OF THE FCC ORDER BE POSTPONED FOR ONE TELEVISION SEASON

Time-Life, moreover, earnestly implores this Court that, at the very least, the effective date of the FCC's precipitous order should be postponed for a single television season - until the fall of 1975.

It is respectfully submitted that it was either "arbitrary," "capricious" or "an abuse of discretion" (5 U.S.C. §706[2][A]) for the FCC to give independent producers and distributors a mere seven months to "adjust" to their market being cut by more than one half and their one-hour programs being rendered unsalable, when the giant television networks (whose monopoly the access rule was and is designed to loosen) were given more than two years (18 months for new network product) to adjust to the original cut in network prime time from four hours to three.

As noted by NAITPD, the FCC announced the new, weakened rules for the first time on November 29, 1973, but this announcement was completely silent as to the effective date thereof. Based on the FCC's past practices, Time-Life had every right to assume and did in fact assume (Wynn

Nathan affidavit previously described, pars. 3-7) that the independent producers and distributors would be given the same consideration as the giant networks. Indeed, irrevocable production commitments had to be made for the fall, 1974 season well before November 29, 1973. Time-Life thus committed considerable funds, energy and business reputation to producing new, innovative, quality programs - only to be caught with commercial white elephants (albeit quality white elephants) when the FCC finally announced its precipitous effective date on January 24, 1974 in a press release (the text of the new rules was only released on February 6, 1974).

It is respectfully submitted that this Court is mandated to correct such arbitrary and capricious abuses of discretion by the FCC pursuant to 5 U.S.C. §706(2)(A), above-quoted.

Moreover, the effective date aspect of the subject order (pars. 75-76, 113-116) is clearly unsupported by substantial evidence and clearly unwarranted by the facts, also mandating relief by this Court pursuant to 5 U.S.C §706(2)(E) and §706(2)(F), above-quoted.

Indeed, it is striking that the FCC <u>failed to make findings</u> regarding the calamitous effect on independent

producers that necessarily results from the FCC's precipitous effective date of its order. Moreover, any implied findings by the FCC to the contrary are clearly unsupported by evidence and are unwarranted by the facts. Indeed, as noted, the FCC's precipitous effective date is directly contrary to the FCC's prior practices and consequent industry expectations. In short, the FCC, having led independent producers into the marketplace, now leaves them holding a bag of unsalable quality programs, causing them irreparable damage, merely so that the networks can increase their already great dominance this year rather than next year.

What is even more striking is that the FCC has not really found facts at all, contrary to its statutory mandate. In the section of its order dealing with the effective date (pars. 113-116), the FCC merely notes that different organizations favor different effective dates, giving a skeletal review of some of the conflicting reasons urged therefor, and the FCC then concludes, without any real findings of fact and, indeed, hardly any presentation of reasons, that picking an apparent average of requested effective dates

> "appears to be the most satisfactory resolution in light of all the circumstances [unspecified] and the nature [unspecified] of the changes made." (par. 113)

This is not fact finding.

The FCC then goes on to state, without giving any supporting reasons, that

> "Clearly the public interest is served by making improvements in any rule effective at a reasonably early date." (ibid)

Aside from whether increasing network dominance is an "improvement," the FCC certainly had a contrary view of the public interest when it granted the giant networks more than two years to adjust to the original access rule.

Finally, the FCC concludes, without citing any facts or further reasons in support, that a later effective date is not needed

> "in view of the limited expansion of network programming which we have decided to permit." (ibid)

> "The 8-month period thus allowed appears adequate [no facts or further reasons given] for all parties to make plans and preparations in light of the fairly small changes which have been adopted." (ibid)

The FCC thus concluded, without real fact finding and indeed, contrary to the undisputed facts set forth in Wynn Nathan's affidavit (as well as numerous other affidavits of other independent producers and distributors presented to the FCC by NAITPD--see Appendixes E through M of NAITPD's Petition for Stay) that cutting the independents' market more than half and, even more importantly, making their one-

hour programs unsalable to local network affiliates was a "limited expansion of network programming" which constituted "fairly small changes."

Such "reasoning" the courts exist to correct, pursuant to the statutory mandate.

Why, then, did the FCC act as it did? This question cannot be answered with certainty, but at the time the FCC refused to stay the effective date of its order, there were only five FCC Commissioners instead of the seven mandated by statute and one of these five, the then FCC Chairman, was being widely criticized by United States Senators and others for voting on issues before the FCC while he had "one foot in the White House" (appointment to Cabinet rank position as Counselor to President Nixon), so the FCC was perhaps reticent to review the subject order. The New York Times, March 6, 1974, p. 74. Another view of the reasons behind the FCC's precipitous effective date and subsequent refusal to grant a modest stay is contained in the March 18, 1974 issue of the Gallagher Report (the well-known newsletter for media executives):

> "Surprise decision not to delay new prime-time-access regulations typical of regulatory body afraid to look weak. Commission-chairman Dean Burch to tie up loose ends before joining White House staff . . . [an FCC staff member] called for vote at National Association of Television Program

> Executives convention -- shocked when overwhelming majority voted to postpone revision. Later advised FCC to ignore convention vote. Result: FCC aligns itself with three networks, five major production companies, three talent agencies against majority of industry." (p. 1) (emphasis added)

Whatever the actual reasons, it seems clear that the FCC's precipitous effective date should be postponed for at least a single television season, pursuant to the statutory mandate of 5 U.S.C. §706(2).

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841 (App. D.C. 1970), cert. den. 403 U.S. 923, rehearing den. 404 U.S. 877, cert. den. 406 U.S. 943, noted that the reviewing court must intervene, not merely in cases of procedural inadequacies and bypassing of the legislative mandate, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems and has not genuinely engaged in reasoned decision-making. This is the instant case.

It should also be noted that the courts do not accept appellate counsels' post hoc rationalizations for agency action; an agency's discretionary order will be upheld, if at

all, solely on the same basis articulated in the order by the agency itself. Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156 (1962). Moreover, the weight given to agency decisions depends on the thoroughness, if any, evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements and all those factors which give it power to persuade, if lacking power to control. Chemical Bank New York Trust Co. v. S.S. Westhampton, 358 F.2d 574 (C.A. Md. 1965), cert. den. 385 U.S. 921.

The issue, therefore, is whether the FCC's order was unreasonable or capricious in light of the reasons given therefor by the FCC. Kessler v. F.C.C., 326 F.2d 673 (App. D. C. 1963). Both common sense and fair play require that the reasons set forth by an agency for its decisions be both clearly disclosed and adequately sustained. Greyhound Corp. v. U.S., 221 F.Supp. 440 (D.C. Ill. 1963). Courts reviewing the reasonableness and fairness of decisions of federal agencies should be influenced by the feeling that they should not abdicate their traditional judicial function of review. Clemochefsky v. Celebrezze, 222 F.Supp. 73 (D.C. Pa. 1963). Agency decisions must be set aside or modified when, as here, they are unsupported by substantial evidence. N.L.R.B. v. Hart Cotton Mills, 190 F.2d 964 (C.A. 4 1951); General Motors

Corp. v. U.S., 207 F.Supp. 641 (D.C. Mich. 1962), aff'd 324 F.2d 604; Bonica v. Olesen, 126 F.Supp. 398 (D.C. Calif. 1954).

CONCLUSION

It is respectfully submitted that the FCC's subject order should be modified as requested by NAITPD. Moreover, Time-Life earnestly urges that this Court, at the very least, postpone the effective date of the FCC's order for a single television season.

Respectfully submitted,

Dated: New York, N.Y.
March 21, 1974

HARDEE BAROVICK KONECKY & BRAUN
300 Park Avenue
New York, New York 10022
(212) 421-1144

PIERSON, BALL & DOWD
100 Ring Building
Washington, D. C. 20036
(202) 331-8566

Attorneys for Intervenor
Time-Life Films, Inc.

OF COUNSEL:

PETER BIERSTEDT, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents,

and

TIME-LIFE FILMS, INC., AMERICAN BROADCASTING COMPANIES, INC., COLUMBIA PICTURES INDUSTRIES, INC. , COLUMBIA BROADCASTING SYSTEM, INC. and WARNER BROS. INC.,

Intervenors.

Case No. 74-1168

AFFIRMATION OF SERVICE

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PETER BIERSTEDT, an attorney admitted to practice in this State, hereby affirms under penalty of perjury that on March 21, 1974 (pursuant to the Court's March 12, 1974 order that all parties may file their papers in typewritten form) he served true copies of the brief of intervenor Time-Life Films, Inc. (dated March 21, 1974) by mail upon the

parties in this review proceeding, as follows:

1. John W. Pettit, Esq.
   General Counsel
   Federal Communications Commission
   Washington, D. C. 20554

2. The Honorable William B. Saxbe
   Attorney General of the United States
   United States Department of Justice
   Washington, D. C. 20530

3. Katrina Renouf, Esq.
   Renouf, McKenna & Polivy
   1532 Sixteenth Street, N.W.
   Washington, D. C. 20036

4. John D. Lane, Esq.
   Hedrick & Lane
   1211 Connecticut Avenue, N.W.
   Washington, D. C. 20036
   (Attorneys for Westinghouse Broadcasting Company, Inc. in companion Case No. 74-1283

5. James A. McKenna, Jr., Esq.
   McKenna, Wilkinson & Kittner
   1150 Seventeenth Street, N.W.
   Washington, D. C. 20036
   (Attorneys for Intervenor
   American Broadcasting Companies, Inc.)

6. J. Roger Wollenberg, Esq.
   Wilmer, Cutler & Pickering
   1666 K Street, N.W.
   Washington, D. C. 20006
   (Attorneys for Intervenor
   Columbia Broadcasting System, Inc.)

7. Stuart Robinowitz, Esq.
   Paul, Weiss, Rifkind, Warton & Garrison
   345 Park Avenue
   New York, New York 10022
   (Attorneys for Intervenors
   Warner Bros. Inc. and Columbia
   Pictures Industries, Inc.)

8. Arthur Scheiner, Esq.
Wilner & Scheiner
2021 L Street, N.W.
Washington, D. C. 20036
(Attorneys for Intervenor
MCA Inc.)

Affirmed this 21st day of March, 1974.

Peter Bierstedt

Peter Bierstedt